

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE

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IN RE:

APPLICATION OF JACKSON ENERGY  
AUTHORITY FOR A CERTIFICATE OF  
CONVENIENCE AND NECESSITY

T.R.A. DOCKET ROOM

DOCKET NO. 03-00438

**CHARTER COMMUNICATIONS, INC.'S POST-HEARING BRIEF**

On July 15, 2002, Jackson Energy Authority ("JEA") filed an Application for a Certificate to Provide Telecommunications Services as a facilities-based Carriers' Carrier (the "Application"). Charter Communications, Inc. ("Charter") intervened in this matter, and a two-day hearing was held before the Tennessee Regulatory Authority ("TRA") on November 10, 2003 and November 24, 2003. Charter hereby files its Post-Hearing Brief in opposition to JEA's Application as filed.

JEA is a public corporation formed by the State of Tennessee. (Testimony of John W. Williams, Transcript of Proceedings, Volume I, Page 19, Lines 14-16). According to the Application, JEA is a public utility that provides electric, gas, water, and wastewater services throughout Jackson, Tennessee and adjacent areas of Madison County, Tennessee. As set forth in the Application, JEA intends to build a "fiber to the home" broadband network that can provide cable television, video, and Internet services as readily as telephone and data services. According to the Application, JEA plans to provide cable television and Internet services via the network, but JEA does not intend to provide voice or data services to end users at the present time. Instead, JEA intends to offer third party competitive local exchange carriers ("CLECs") an opportunity to use the network to provide such services to end users. According to the Application, the

construction of the network will be financed by the issuance of municipal bonds, which are ultimately guaranteed by the City of Jackson, Tennessee, and which will also be used for operating expenses during the start-up period of JEA's cable television and Internet operations.

JEA has formed a separate Telecommunications Division for business and accounting purposes. The Telecommunications Division will consist of three business units: the cable television business unit, the Internet access business unit, and the telephone business unit. All of the network investment will be assigned to the cable television business unit, and most of the operating expenses will remain with that unit. The telephone business unit will not have any network investment assigned to it, nor will that unit have any employees.

Charter respectfully submits to the TRA that the proposed organizational structure of the Telecommunications Division circumvents JEA's statutory obligations, minimizes regulatory oversight, and promotes anti-competitive cross-subsidy. Furthermore, JEA has failed to provide adequate documentation in support of the projected financial results of the telephone business unit. JEA has also not demonstrated that it can satisfy the requirements for managerial competence provided for in the statutes.

**A. JEA does not have the statutory authority to finance the construction of a telephone network through issuing municipal bonds.**

It has long been recognized in the State of Tennessee that a municipality may exercise only those expressly or necessarily implied powers delegated to it by the General Assembly. City of Lebanon v. Baird, 756 S.W.2d 236, 241 (Tenn. 1988). "It is universally recognized that municipal corporations can exercise no powers which are not

in express terms, or by reasonable intendment, conferred upon them, and hence have no power [to do an act], in the absence of a charter provision or statutory enactment empowering them to do so either in express terms or by necessary implication.” Warren v. Bradley, 284 S.W.2d 698, 702 (Tenn. App. 1955).

Through statute, the General Assembly has provided that a municipality operating an electric plant may issue bonds “to finance in whole or in part the cost of the acquisition, purchase, [or] construction. . .of a system or systems, or any part thereof, to provide” cable services, two-way video transmission, video programming, or Internet services. T.C.A. § 7-52-607. Telephone, telegraph, and telecommunications services, however, are specifically excluded from the list of services covered by that statutory provision. T.C.A. § 7-52-601 (b). Furthermore, there is no separate statute permitting the issuance of bonds for the acquisition or construction of a telephone network. Thus, while there is statutory authority that permits a municipality to finance a cable network through bonds, there is no such authority granted for a municipality to finance a telephone network through such means.

In Tennessee, the scope of local governmental authority is determined through the application of “Dillon’s Rule.” Southern Constructors, Inc. v. Loudon County Bd. Of Education, 58 S.W.3d 706, 710 (Tenn. 2001). Under Dillon’s Rule, local governmental authority is strictly construed, and such power may only be exercised only if at least one of the following conditions is satisfied: (1) the power is expressly granted in the statute, private act, or charter; (2) the power is necessarily or fairly implied in, or incident to, the expressly granted power; or (3) the power is implied as essential to the declared purposes of the municipality. Id. at 710-11. If there is any reasonable doubt regarding whether the

power may be exercised, such doubt must be resolved against the municipality, and such power must be denied. Id. at 711.

Applying Dillion's Rule in this case, it is clear that JEA does not have the power to finance the construction of the telephone portion of its network through the issuance of municipal bonds. Such a power has not been expressly granted, the power is not implied in, or incident to, any expressly granted power, and the power is not essential to the declared purposes of JEA. Even if there were some reasonable doubt regarding the issue, any such doubt must be resolved against JEA. Therefore, application of Dillon's Rule precludes JEA from financing the construction of a telephone network through the issuance of municipal bonds.

As proposed, the network is going to provide telephone service, in addition to cable and Internet services. JEA may not be providing those services to the end users, but it is nevertheless building a network that it anticipates will be used in providing such services. Furthermore, JEA may at some point elect to provide such service to end users. As is clear from the Application and the testimony at the two-day hearing in this matter, the proposed network will be financed by \$54.3 in municipal bonds. The bonds were issued to JEA's Telecommunications Division (Testimony of Dana R. Wheeler, Transcript of Proceedings, Volume II, Page 209, Lines 15-21), which includes the telephone business unit. These bonds are guaranteed by JEA's Electric Division and by the City of Jackson, Tennessee (Testimony of John W. Williams, Transcript of Proceedings, Volume I, Page 60, Line 22, through Page 61, Line 2). Furthermore, the assets of the Telecommunications Division -- including, obviously, the telephone business unit -- are security for those bonds. (Id., Page 62, Lines 2-4). The actual

construction of the network will be financed by municipal bonds. Therefore, JEA is constructing a telephone network through municipal bonds, which it has not been authorized by the General Assembly to do.

**B. There is serious doubt as to whether JEA's proposed telephone business unit has the requisite managerial, financial, and technical qualifications.**

An entity that seeks to provide telecommunications services must first obtain a Certificate of Public Convenience and Necessity ("CCN") from the TRA. T.C.A § 65-4-201 (c). To qualify for a CCN, the applicant must demonstrate that it will adhere to all applicable TRA policies, rules, and orders. T.C.A § 65-4-201 (c)(1). The applicant must also establish that it has sufficient managerial, financial, and technical abilities to provide the applied for service. T.C.A § 65-4-201 (c)(2).

As to managerial and technical abilities, none of the individuals identified in the Application as members of the management team have any background or experience in the telephone business. (Testimony of Kim Kersey, Transcript of Proceedings, Volume I, Page 93, Lines 14-16; Testimony of Dana R. Wheeler, Transcript of Proceedings, Volume II, Page 192, Lines 2-7; Testimony of Thomas E. Nanney, Transcript of Proceedings, Volume III, Page 267, Lines 18-20; Testimony of Darrell Pope, Transcript of Proceedings, Volume III, Page 279, Lines 8-19). Any knowledge that these individuals may have regarding the telephone business has come only recently during the development of the network project. (Testimony of Dana R. Wheeler, Transcript of Proceedings, Volume II, Page 192, Lines 20-22 and Page 193, Lines 7-11). Furthermore, JEA does not anticipate hiring any management personnel with experience in the

telephone business. (Testimony of Kim Kersey, Transcript of Proceedings, Page 94, Lines 1-7).

In addition, Kim Kersey, the Senior Vice President of Telecommunications at JEA, has in the past opined that JEA should concentrate and focus on its core utility business, and he further expressed during these proceedings that he still thinks “generally it’s a fair statement.” (Testimony of Kim Kersey, Transcript of Proceedings, Page 86, Lines 16-25). Such an opinion should be cause for concern, as Mr. Kersey will be managing the division in which the telephone business unit operates, and, as set forth in the Application, there will be no manager specifically dedicated to the telephone business unit. Mr. Kersey’s belief that it is a “fair statement” that JEA should concentrate on the provision of electrical, water, gas, and wastewater services casts at least some doubt on his dedication to JEA’s provision of new telecommunications services.

As to financial abilities, there is little doubt that the overall JEA organization is financially capable. It should be pointed out, however, that over the past 60 years or so of JEA and its predecessor’s operation, it has accumulated around \$100 million in long-term debt. (Testimony of Dana R. Wheeler, Transcript of Proceedings, Page 194, Lines 9-14). In contrast, the long-term debt for the Telecommunications Division alone, which does not have a single customer, a single contract with a CLEC, or a single ounce of revenue, is already \$54.3 million. (Id., Page 194, Line 15-25 and Page 195, Lines 1-4). Thus, in the space of less than a year, this new division has already accumulated half as much long-term debt as the other four divisions in the past 60 years.

Despite JEA’s overall financial qualifications, the TRA must consider in particular the financial qualifications of the telephone business unit on its own, as JEA is

prohibited from subsidizing the telephone operations. The hearing in this matter has left doubt as to whether the telephone business unit has such qualifications, absent JEA's subsidization or qualifying loans -- of which none are anticipated and no obligations currently exist. For example, the \$1 million unsecured line of credit from Union Planters Bank which is to be used for working capital for the telephone business unit was granted because of "[t]he good name of the Jackson Energy Authority." (Testimony of Dana R. Wheeler, Transcript of Proceedings, Volume II, Page 198, Lines 5-8). JEA has admitted that it is unusual for a lender to grant an unsecured \$1 million credit line (Testimony of John W. Williams, Transcript of Proceedings, Volume I, Page 75, Lines 19-22), especially to a start-up operation. Union Planters was willing to grant that line of credit in this case, however, because Union Planters has had a business relationship with JEA for "many, many years," has been aggressive in pursuing JEA's business, and was interested in sustaining its relationship with JEA. (Testimony of Dana R. Wheeler, Transcript of Proceedings, Volume II, Page 201, Lines 13-21 and Page 202, Lines 10-14). Furthermore, the line of credit is available for the use of any business unit in the Telecommunications Division, (Id., Page 200, Lines 12-15), and JEA's Chief Financial Officer expects that the cable business unit will indeed use that line of credit for short-term purposes such as processing payroll and accounts payable. (Id., Page 200, Lines 16-24). Thus, the telephone business unit does not truly have an independent source of finances.

Finally, JEA's decision to seek certification as a facilities-based carrier's carrier, rather than as a retail provider, has already led to financial restrictions. JEA has entered into an agreement with Aeneas Communications which will keep JEA out of the retail

marker for up to 10 years. Such an agreement restricts competition and is likely against public policy. Should the revenues not live up to JEA's expectations, it will be unable to enter the retail market in order to increase its income. The TRA will need to consider these restrictions in any grant of a CCN to JEA, including whether the settlement agreement has taken the matter out of the purview of the TRA, and into the hands of the Chancery Court for Madison County, Tennessee.

**C. JEA's Telecommunications Division has been structured in a way that will avoid oversight by the TRA.**

Unlike prior cases involving municipal involvement in telecommunications services, operations of the applicant in this case have been moved to and concentrated in an entity or unit over which the TRA has no authority. As such, there will be little or no effective oversight by the TRA, beyond perhaps a periodic review of updated cost allocation information. The detailed cost allocation manual that JEA has proposed means very little under these circumstances, as the TRA will see only the end results, not the information that went into the calculations. Under the manual, the telephone business unit is merely being charged for services, and there is no supporting information provided to flesh-out those charges.

As William J. Barta testified based upon his review of the Application and the supporting materials, JEA has created a "shell" telephone business unit without fixed assets, network investment, or employees, and that business unit is dependent upon the operations and the success of the cable television business unit. (Testimony of William J. Barta, Transcript of Proceedings, Volume III, Page 289, Lines 21-25): JEA has agreed that the operations of the cable, Internet, and telephone business units are intimately

related and are dependent on one another. (Testimony of Dwight Work, Transcript of Proceedings, Volume II, Page 235, Lines 3-20). The cable business unit, however, will reflect nearly all of the investment and expenses associated with the network. As Mr. Barta pointed out, these elements could just have easily been assigned to the telephone business unit, with the cable unit paying a carrying charge for its use of the network. (Testimony of William J. Barta, Transcript of Proceedings, Volume III, Page 290, Lines 22-25). As no witness who testified on behalf of JEA set forth a sufficient explanation as to why the investment was assigned to the cable unit, as opposed to the telephone unit, then the TRA should have the opportunity to review information relating to the cable unit. The Application, however, does not disclose any financial, operational, or other information regarding the other business units.

Under the cost allocation manual and the pro forma financial statements submitted with the Application, the telephone business unit will have no fixed assets or direct employees, nor will it be assigned or allocated any network investment. In addition, the telephone business unit will be allocated only minimal operating expenses. This seems to be at odds with JEA's indication that one of the primary reasons for building the proposed network is that industries that are considering locating their operations in the Jackson, Tennessee area are interested in the availability of telecommunications. (Testimony of John W. Williams, Transcript of Proceedings, Page 14, Line 24, through Page 15, Line 2). According to JEA, these industries make their decisions based on their high requirements for bandwidth. (Id., Page 15, Lines 3-6). JEA has also admitted that, directly, the Internet and telephone services will enhance the economic capabilities of the Jackson, Tennessee community. (Id., Page 64, Line 25,

through Page 65, Line 2). In addition, according to the information provided, the telephone business unit will be responsible for between 30 and 50 percent of the revenue for the entire Telecommunications Division. (Testimony of Ken Kersey, Transcript of Proceedings, Page 133, Lines 3-11). Nevertheless, despite the fact that the provision of Internet and telephone services is so vital to drawing businesses to Jackson, and despite the fact that it will be responsible for a large percentage of the anticipated revenues, JEA concentrates all of the substance in the cable business unit, rather than in the other units. Because JEA's choice seems not to be based on the relative important of the business units to the success of the network as a whole, the TRA should have the opportunity to review information relating to the cable unit.

The telephone business unit will be charged a variable access fee by the cable television business unit for its use of the network facilities. The cable television business unit controls the network and the administrative and other employees that will support the network. In its Application, however, JEA has only provided scant information on the projected operations of the telephone business unit, and no information has been provided on the operations of the cable television business unit or the Internet access business unit. Thus, the success of the telephone business unit is under the control of the cable television business unit – a business unit about which the TRA has no information, and, more importantly, a business unit over which the TRA has no jurisdiction.

As pointed out by Mr. Barta in his pre-filed testimony regarding JEA's provision of a host of other services to its CLEC customers, JEA has identified no revenues for those services in the pro forma income statement. Mr. Barta has opined that if JEA believes that CLECs will contract for the support services, then the pro forma operating

revenues and operating expenses should reflect these activities. As admitted by JEA, however, the access charge is not broken down to provide details regarding the source of revenue, such as CLEC support services or access service. (Testimony of Kim Kersey, Transcript of Proceedings, Volume II, Page 183, Lines 4-20). As a result, the Application contains no explanation as to how the amounts in each line item of the financial statements were developed. For instance, as pointed out by Mr. Barta in his pre-filed testimony, operating revenues, which are described as “access fees for telephone,” are projected to grow from approximately \$75 thousand in the first year of operations to over \$2 million by the third year. This represents phenomenal growth, and the TRA and other interested parties should have the opportunity to review information supporting these projections, such as market penetration assumptions, the array of services that will generate the revenues, and CLEC growth in the service area. Without such information, it is difficult to determine whether JEA meets the statutory requirements.

The need for detailed documentation is underscored by the level of contribution that the telephone business unit is expected to make to the overall success of the Telecommunications Division. Although the telephone business unit is a shell entity without any fixed assets or employees, the unit is projected to experience phenomenal growth and be spectacularly profitable. The proceeds from the robust profitability of the telephone business unit will be used to retire the municipal bond obligations of the Telecommunications Division. The profits from the remaining business units of the Telecommunications Division may not be sufficient to satisfy the debt obligations. Therefore, the assumptions and analysis underlying the profitability of the telephone business unit must be tested and thoroughly evaluated in light of the unit’s financial

significance to the overall operations of the Telecommunications Division. The projected profitability of the telephone business unit should be viewed with caution as the CLEC community has not fared well financially. In order for the telephone business unit to realize the ambitious projected stream of income, the carriers using its network must also be able to sustain profitable operations. Historically, the ability to survive in the telecommunications marketplace has been difficult as nearly 70 firms have filed for bankruptcy in recent years. The TRA must have much greater disclosure on the projected operations of the Telecommunications Division as a whole and the telephone business unit in particular before it can assess the financial soundness of the Application.

Simply put, the Application does not present adequate information on the proposed operations of JEA's Telecommunications Division to allow the TRA to make an informed decision on whether JEA's request to serve as a facilities-based carriers' carrier should be approved. The TRA should require that JEA provide complete disclosure of the operations of all of the business units operating under the umbrella of the Telecommunications Division. Since the TRA will effectively have no oversight over JEA's telecommunications operations, it is imperative that the TRA have all possible information available for its review prior to considering the Application. At a bare minimum, the TRA should be given the opportunity to review the cable business plan, as it lies at the heart of the network. With the intimate ties between the telecommunications business units, anything that affects one of the units will undoubtedly affect the other units. If the cable business unit does not survive, then neither will the telephone business unit. Therefore, the TRA should review documents relating to JEA's cable plan before making any determination regarding the Application in this case.

**D. There is insufficient information before the TRA to ensure that JEA has adequately addressed the issue of subsidization.**

The General Assembly has mandated that municipalities providing telephone or telecommunications services shall not provide subsidies for those services. T.C.A. § 7-52-402. The only subsidies permitted are for the municipality to dedicate some portion of its electric plant to the provision of such services, and for the municipality to lend funds to acquire, construct, and provide working capital in order to provide such services. T.C.A. § 7-52-402 (1) & (2). The costs for the exceptions, of course, must be allocated to the telephone and telecommunications services. Id. In this case, because JEA has labeled the proposed network as a cable television network, thereby keeping oversight away from the TRA, the hazards of subsidy concealment are greater.

The reasons for the prohibition of subsidies are clear. Municipalities providing utility services such as electric and water have a captive customer base for those essential services. Use of the telephone and telecommunications services, on the other hand, would be on a voluntary basis. The issue of subsidies arises because the General Assembly has sought to prevent customers of regulated utilities from subsidizing customers of non-regulated operations. In this case, it is abundantly clear that JEA has provided and will continue to provide subsidies in one form or another to the telephone business unit. The divisions of JEA have an ability to share resources and employees that other entities seeking to compete in the telephone business do not. (Testimony of Dana R. Wheeler, Transcript of Proceedings, Volume II, Page 206, Lines 1-9).

Despite JEA's proclamation that "[e]ach division will stand on its own" (Testimony of John W. Williams, Transcript of Proceedings, Volume I, Page 16, Line

11), it is clear that the telephone business unit is incapable of standing on its own. JEA's Electric Division fronted the costs of starting up the telephone business unit, and then the Telecommunications Division secured a line of credit which was used to reimburse the Electric Division for those start-up costs of the telephone business unit. (Id., Page 210, Lines 12-22). As detailed in Section B, above, the \$1 million unsecured line of credit from Union Planters Bank was granted because of JEA's involvement, not because of the proposed telephone services. Furthermore, that line of credit is available for the use of any business unit in the Telecommunications Division, and JEA expects that the cable business unit will make use of that line of credit. In contrast to JEA's Telecommunications Division, a private firm seeking short-term financing as a new market entrant would certainly find it difficult to arrange such attractive terms, especially without owning any fixed assets, having any employees, or generating any operating revenues.

JEA's arbitrary decision to assign all network investment to the cable television business unit allows the municipality to posture the network as a cable television network for financing purposes. By claiming that the network is a cable television network, JEA can pursue financing alternatives not available to competitors. Instead of competing for scarce private capital to fund the Telecommunications Division venture, JEA was able to raise \$54.3 million through lower cost municipal bonds. Furthermore, the municipal bonds are guaranteed by the Electric Division and the City of Jackson, Tennessee.

In addition, costs are currently being incurred relating to the storage of the network fiber at Utilicore. (Testimony of Darrell Pope, Transcript of Proceedings, Volume III, Page 276, Line 14 through Page 278, Line 7). According to Darrell Pope,

the project manager, those storage fees are being paid by the Telecommunications Division. (Id.). No where in the information provided in the Application, however, is there an accounting for this particular cost. Furthermore, no additional documentation was produced at the hearing regarding these costs.

In addition, at some point, it will be necessary for JEA to add on additional employees merely because of the volume of the telephone business unit. (Testimony of Kim Kersey, Transcript of Proceedings, Volume II, Page 180, Lines 11-14). Those employees, however, will be employees of JEA in general, and will not be specifically assigned to the telephone business unit. (Id., Page 179, Lines 9-14). As a result, although the need for these new employees was precipitated by the telephone business unit, that unit will incur no direct costs associated with that employee, other than whatever share is allocated to it later on.

JEA's arguments that private companies such as Charter and BellSouth can also use their existing employees and other resources to enter new service areas are irrelevant and without merit. Simply put, those are private companies, not governmental entities like JEA. The General Assembly was concerned enough about the matter to enact statutes relating to such governmental entities, and that is what the TRA must consider when looking at the Application. JEA's electric, gas, water, and wastewater customers are captive customers, and Tennessee statutes prohibit municipalities in the telephone business from using that as a competitive advantage.

**E. Conclusion**

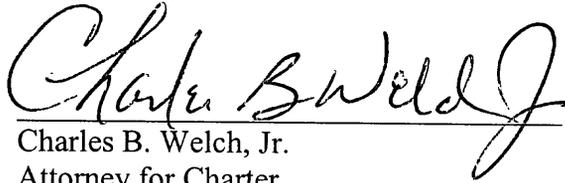
JEA has admitted that access to information is important in order to reduce -- to the extent possible -- cross-subsidization. (Testimony of Dwight Work, Transcript of

Proceedings, Volume II, Page 242, Lines 8-12). Charter is simply requesting that the TRA be given such information, so that it may reach an informed decision regarding the Application.

WHEREFORE Charter respectfully requests that JEA's Application be denied, or, in the alternative, that JEA be required to provide sufficient additional information to address the concerns set forth hereinabove.

Respectfully submitted,

FARRIS, MATHEWS, BRANAN  
BOBANGO & HELLEN, P.L.C.



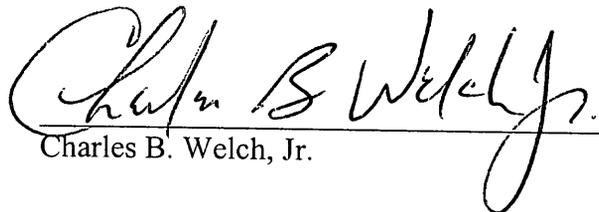
Charles B. Welch, Jr.  
Attorney for Charter  
618 Church Street, Ste. 300  
Nashville, Tennessee 37219  
(615) 726-1200

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served via U.S. Mail, postage prepaid, upon the following parties of record, this the 8<sup>th</sup> day of December, 2003.

Carols C. Smith  
Mark W. Smith  
Counsel for Jackson Energy Authority  
Strang Fletcher, Carriger Walker  
Hodge & Smith PLLC  
400 Krystal Building  
One Union Square  
Chattanooga, TN 37402

Henry Walker  
Boult Cummings Conners & Berry, PLC  
414 Union Street, Suite 1600  
P.O. Box 198062  
Nashville, TN 37291



Charles B. Welch, Jr.